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IN THE
COURT OF APPEALS OF INDIANA

MICHAEL W. MORGAN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 84A05-0602-PC-83
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE VIGO SUPERIOR COURT, DIVISION 3
The Honorable David R. Bolk, Judge
Cause No. 84D03-0402-PC-396

August 24, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary[1]

Michael Morgan appeals the denial of his petition for post-conviction relief ("PCR petition"). We affirm.

Issues

Morgan raises two issues on appeal, which are:

I. whether the post-conviction court erred by granting the State's motion for summary judgment with regard to Morgan's Brady argument; and

II. whether the post-conviction court erred by granting the State's motion for summary judgment with regard to Morgan's ineffective assistance of counsel argument.

Facts

The facts most favorable to the post-conviction court's decision reveal that on January 14 and 15, 2001, Morgan, while armed with a handgun, confined Laura Morgan without her consent. Laura contacted the police to report the incident but later recanted. On September 29, 2003, Morgan confessed to the incident described by Laura. On September 30, 2003, Laura gave a statement to police in which she indicated that Morgan had confined her at gunpoint in 2001. On October 2, 2003, the State charged Morgan with criminal confinement, a Class B felony. Morgan pled guilty to that charge on December 3, 2003, and, on the same day, the trial court sentenced him to ten years imprisonment, with four years suspended.

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[1] On July 24, 2006, Morgan filed a motion asking us to reconsider our order denying his emergency petition for immediate release from present custody. Because we affirm the trial court's grant of summary judgment in favor of the State, the question of whether Morgan should be released is resolved, and we deny his motion to reconsider.

On January 28, 2004, Morgan filed a PCR petition. On July 7, 2004, Morgan filed a request for admissions in which he requested that the State admit it had failed to provide him with certain exculpatory or impeaching evidence after he had requested the same. The trial court ordered the State to answer Morgan's request within thirty days. The State filed no answers to Morgan's request. On October 5, 2004, Morgan amended his PCR petition and alleged that the State withheld favorable evidence and that his trial counsel, Michael Rader, was ineffective. The State answered the petition on October 25, 2004.

On November 11, 2004, the State moved for summary judgment. The trial court granted the State's motion on May 18, 2005, and Morgan appealed. On November 14, 2005, in an unpublished memorandum decision, this court reversed the grant of summary judgment in favor of the State and remanded Morgan's petition to the trial court with instructions for the post-conviction court to enter findings of fact and conclusions of law on all the issues. See Morgan v. State, No. 84A5-0506-PC-337, (Ind. Ct. App. Nov. 14, 2005). On January 31, 2006, the post-conviction court issued an order containing its findings and conclusions and again denied Morgan's PCR petition. That order contained the following findings and conclusions.

Findings of Fact

> 1. That on September 29, 2003 the Petitioner confessed (after waiving his Miranda rights) to Indiana State University Police that he had confined, at gunpoint, Laura Morgan in January of 2001.
>
> 2. That on October 2, 2003 this Petitioner was charged with Criminal Confinement, a Class B felony.

3. That a public defender was appointed to represent this Petitioner and that Michael Rader entered his appearance on behalf of his [sic] Petitioner.

4. That on December 2, 2003, Vigo Superior Court Division 1 accepted this Petitioner's plea of guilty as charged and entered judgment accordingly.

5. That Mr. Rader acted as this Petitioner's counsel throughout and is licensed to practice both law and medicine in the State of Indiana. Mr. Rader did not detect any symptoms of any illness that would preclude this Petitioner from entering into a knowing plea of guilty.

6. That the Petitioner was sentenced to the minimum, non-suspendable sentence pursuant to Mr. Rader's negotiations with the State.

7. That Petitioner filed an Amended Post-Conviction Relief Petition on October 5, 2004 and the State's response was filed thereafter on October 25, 2004.

8. The State filed its motion for Summary Judgment on November 4, 2004.

9. That a hearing on the Motion for Summary Judgment was held on May 13, 2005. The Petitioner testified at the hearing and the Petitioner and the State presented arguments and the Court took the motion under advisement.

10. The Court reviewed the evidence, arguments and reviewed the pleadings and record.

11. The State met its burden of proving that no genuine issues of material fact exists in this cause.

12. The Petitioner failed, thereafter, to prove the existence of material fact at issue.

13. The Petitioner asserted variously [sic] that his counsel was not effective and the prosecutor withheld favorable information from him, that his rights were violated

generally and that he lacked an understanding of the proceedings; all of which allegations entirely lacked credibility.

14. The Petitioner failed to assert actual innocence in his pleadings, testimony, or arguments.

15. The Petitioner asserted that his conviction could not properly be based on his extra judicial confession without acknowledging that his knowing, voluntary, and intelligent plea wherein he affirmed the facts of the charge is not extra judicial.

16. No direct appeal was taken and the Petitioner has not petitioned to withdraw his guilty plea.

17. The Petitioner failed to establish by any credible factual information that his counsel was ineffective or that any viable defense was overlooked and he failed to produce any credible evidence that the outcome of the case would have changed by any such defense.

18. That no genuine issue of material fact exists and the State has met its requisite burden of proof including evidence, arguments and the record of this case, and it is entitled to judgment as a matter of law.

Conclusions of Law

*** * * * ***

7. The State carried its burden of proving that no genuine issue of material fact exists and the Petitioner/Defendant proved no such fact existed.

8. The Petitioner/Defendant failed to credibly establish any ineffectiveness by counsel nor any possibility of a change of outcome in his cause would have occurred.

9. The record reveals overwhelming credible evidence of effective counsel and a knowing, voluntary, and intelligent plea by the Petitioner/Defendant who confessed both of [sic] the record and under oath in his plea.

Judgment

> The Court now therefore orders, adjudges and decrees that Michael Morgan's Petition for Post-Conviction Relief is denied.

Supp. App. pp. 74-76. Morgan appeals.

Analysis

Petitions for post-conviction relief are civil in nature, and petitioners bear the burden of proving their grounds for relief by a preponderance of the evidence. Allen v. State, 791 N.E.2d 748, 752 (Ind. Ct. App. 2003), trans. denied. A post-conviction petitioner who contests the denial of his or her petition appeals from a negative judgment, and we may only reverse that denial if the "petitioner demonstrates that the evidence as a whole, leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court." Id. (quotation and citation omitted).

In this case, Morgan appeals the post-conviction court's grant of the State's motion for summary judgment. The summary judgment procedure available under Indiana Post-Conviction Rule 1(4)(g) is the same as that which is available under Indiana Trial Rule 56(C). Hough v. State, 690 N.E.2d 267, 269 (Ind. 1997), cert. denied. When a post-conviction court disposes of a petition under Indiana Post-Conviction Rule 1(4)(g),[2]

[2] That section provides:

> (g) The court may grant a motion by either party for summary disposition of the petition when it appears from the pleadings, depositions, answers to interrogatories, admissions, stipulations of fact, and any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The court may ask for

summary judgment is appropriate only when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. See Ind. Post-Conviction Rule 1(4)(g); Hough, 690 N.E.2d at 269. The party moving for summary judgment must designate evidence that proves there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. Id. Once this burden is met, the nonmoving party must show that a genuine issue of material fact does exist. Id. "We must resolve all doubts about facts, and the inferences to be drawn from the facts, in the non-movant's favor." Allen, 791 N.E.2d at 753. It is up to the appellant to persuade us that the post-conviction court erred in granting summary judgment. Id.

I. Brady v. Maryland

Morgan first argues that the State is not entitled to judgment as a matter of law with regard to Morgan's Brady claim and that he "definitively established a Brady violation." Appellant's Br. p. 10. We are not persuaded.

Pursuant to Kyles v. Whitley, 514 U.S. 419, 115 S. Ct. 1555 (1995), and Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963), the State has an affirmative duty to disclose material evidence that is favorable to the defendant. Johnson v. State, 827 N.E.2d 547, 551 (Ind. 2005). "Due process requires the State to disclose to the defendant favorable evidence which is material to either his guilt or punishment." Bowlds v. State, 834 N.E.2d 669, 674 (Ind. Ct. App. 2005) (quotations and citation omitted).

> oral argument on the legal issue raised. If an issue of material fact is raised, then the court shall hold an evidentiary hearing as soon as reasonably possible.

Ind. Post-Conviction Rule 1(4)(g).

To successfully establish a Brady claim, a defendant must show: "(1) that the evidence at issue is favorable to the accused, because it is either exculpatory or impeaching; (2) that the evidence was suppressed by the State, either willfully or inadvertently; and (3) that the evidence was material to an issue at trial." Prewitt v. State, 819 N.E.2d 393, 401 (Ind. Ct. App. 2004), trans. denied.

> Evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is one that is sufficient to undermine confidence in the outcome. . . . So, the question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.

Id. at 402.

Morgan contends that the State withheld favorable evidence when it failed to inform him that a police officer, who was involved in the investigation of his case, had been charged with false reporting related to another matter. He further contends, and the State concedes, that because the State failed to respond to requests for admission in which he asked the State to admit to that omission, the substance of Morgan's request is deemed admitted. We agree that Morgan has correctly articulated the standard set forth in Indiana Trial Rule 36[3] and that the State's failure to respond to Morgan's requests for

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[3] That rule provides:

> The matter is admitted unless, within a period designated in the request, not less than thirty [30] days after service thereof or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer

admission must be viewed as an admission. Despite that admission, we are not persuaded that there is a reasonable probability the outcome of the proceedings would have been different if Morgan had been made aware of the charge against the officer.

Morgan contends that the information withheld by the State would have been material to his decision to plead guilty and that, had he been aware of the officer's alleged false report, he would have opted to proceed to trial and use that information to impeach the officer to attack his credibility. We take Morgan's assertion regarding his guilty plea at face value, for we cannot conjecture the plea he would have chosen under different circumstances. We do not, however, agree that the information would have impacted a fact-finder's decision regarding Morgan's guilt to the extent he suggests.

Even assuming that the State would have called the officer to testify and that the testimony regarding his alleged false reporting would have been admissible, the fact-finder in Morgan's hypothetical trial would have had to have weighed that evidence against the rest of the prosecution's evidence. Given the strength of the evidence available to the State—Morgan's confession and Laura's statement that Morgan confined her at gunpoint[4]—we conclude that it is highly improbable that a fact-finder would have

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> or objection addressed to the matter, signed by the party or by his attorney.

Ind. Trial Rule 36(A).

[4] Morgan attempts to undercut the strength of the State's evidence by pointing out that Laura has a history of mental illness, that she recanted her original statement to the police before giving a second statement, and that Morgan himself has a history of mental illness. He argues that this information would have called into question the credibility of Laura's statement and his confession. Morgan further posits that

found Morgan not guilty. Thus, assuming, arguendo, that the information at issue here was favorable to Morgan and was suppressed by the State as required by the first two prongs of the Brady test, we do not believe that the evidence was material to an issue at trial. Morgan has failed to show that he was prejudiced by the State's withholding of information, and his Brady claim fails. See Beauchamp v. State, 788 N.E.2d 881, 896 (Ind. Ct. App. 2003). The State is therefore entitled to judgment as a matter of law on this issue, and the post-conviction court did not err by granting summary judgment in this regard.[5]

II. Ineffective Assistance of Counsel

Morgan next argues that the trial court erred by granting the State's summary judgment motion with regard to Morgan's ineffective assistance of counsel claim. In Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984), the Supreme Court articulated the general standard a defendant must meet when asserting an ineffective assistance of counsel claim. Strickland requires that a defendant establish deficient performance by counsel resulting in actual prejudice. See Minnick v. State, 698 N.E.2d 745, 751 (Ind. 1998), cert. denied.

However, U.S. v. Cronic, 466 U.S. 648, 104 S. Ct. 2039 (1984), "recognized a narrow exception to Strickland's holding . . . [and] instructed that a presumption of prejudice would be in order in 'circumstances that are so likely to prejudice the accused

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these questions of credibility, coupled with the information withheld by the State, would have been material to the resolution of his case. We remain unpersuaded.

[5] Morgan does not argue that there exist issues of material fact related to his Brady claim.

that the cost of litigating their effect in a particular case is unjustified.'" Florida v. Nixon, 543 U.S. 175, 190, 125 S. Ct. 551, 562 (2004) (quoting Cronic, 466 U.S. at 658, 104 S. Ct. at 2046). The Cronic Court provided three circumstances under which a presumption of prejudice is warranted. See Cronic, 466 U.S. at 659, 104 S. Ct. at 2047. The first of these circumstances is the complete denial of counsel. Id., 104 S. Ct. at 2047. The second is a situation in which "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." Id., 104 S. Ct. at 2047. The third circumstance could occur when "although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." Id.

Morgan contends that he suffered a deprivation of his Sixth Amendment right to representation because his trial attorney entirely failed to subject his case to meaningful adversarial testing and because the surrounding circumstances were such that no lawyer could provide effective assistance. In support of his claims, Morgan identifies several perceived failings on the part of his trial attorney: 1) that Rader neglected to inform the trial court Morgan has a history of mental illness and irrational behavior, including suicide attempts; 2) that Rader neglected to inform the trial court that Laura, too, has a history of mental illness, that prior to her initial statement to police she had been committed to a mental health facility, and that she had recanted that initial statement; and 3) that Rader failed to interview him, advise him of any rights, or meet with him outside of the courtroom at any time but, "instead, forwarded a copy of the State's Guilty-Plea

offer . . . along with a personal letter recommending that [he] accept said Plea, without affording [him] with an opportunity to confer with him at any time." Appellant's Br. pp. 21-22. These errors, Morgan argues, are so egregious, that they lead to a presumption of ineffectiveness. We cannot agree. A review of other cases in which Cronic claims have been raised leads us to the firm conclusion that Morgan's case does not present a set of circumstances so stark that a presumption of prejudice is warranted. The exceptions delineated by Cronic are narrow. Nixon, 543 U.S. at 190, 125 S. Ct. at 562. "Under Cronic, the attorney's failure to test the prosecutor's case must be complete." Bell v. Cone, 535 U.S. 685, 686, 122 S. Ct. 1843, 1846 (2002). This is not such a case.

In Nixon, a capital case, the defendant raised a Cronic claim alleging his counsel to be ineffective after the defense made a strategic decision to concede, during the guilt phase of the trial, that Nixon committed the murder with which he was charged and to focus the defense on establishing, during the penalty phase, cause for sparing the defendant's life. See Nixon, 543 U.S. at 178, 125 S. Ct. at 555. The Florida Supreme Court held: "Any concession of that order . . . made without the defendant's express consent—however gruesome the crime and despite the strength of the evidence of guilt—automatically ranks as prejudicial ineffective assistance of counsel necessitating a new trial." Id. The United States Supreme Court reversed, concluding that the Florida Supreme Court erred in applying the presumptions of deficient performance and prejudice available under Cronic. Id. at 179, 125 S. Ct. at 555.

In Mickens v. Taylor, 535 U.S. 162, 122 S. Ct. 1237 (2002), the Court denied the petitioner's writ of habeas corpus based on an ineffective assistance of counsel argument.

The petitioner in that case was sentenced to death after being convicted of premeditated murder during or following the commission of an attempted forcible sodomy. Id. at 164, 122 S. Ct. at 1239. The petitioner alleged an abridgment of his Sixth Amendment right because his lead trial counsel had been representing the victim at the time of his murder and argued that the trial court should have investigated this potential conflict of interests. Id., 122 S. Ct. at 1240. The Court of Appeals for the Fourth Circuit concluded that the petitioner "had not demonstrated adverse effect" and affirmed the district court's denial of habeas relief. Id. at 165, 122 S. Ct. at 1240 (citation omitted). Citing to Cronic, the Supreme Court affirmed that denial and stated: "The trial court's awareness of a potential conflict neither renders it more likely that counsel's performance was significantly affected nor in any other way renders the verdict unreliable." Id. at 173, 122 S. Ct. at 1244.

We relate the facts of these cases to underscore the grave nature of the circumstances under which the Supreme Court has considered Cronic ineffective assistance of counsel claims such as those that Morgan asserts here. We note that, even under the sobering facts presented in Nixon and Mickens, the Court has declined to extend a presumption of prejudice. Accepting as true the facts that Morgan designates and the inferences to be drawn therefrom—which we must because Morgan appeals from a grant of summary judgment entered against him—the circumstances in this case pale in comparison to the facts presented in Nixon and Mickens. We have no difficulty in concluding that even if the facts transpired as Morgan suggests, this is not a case of the magnitude envisioned by the Cronic Court, and we cannot extend to Morgan the

Strickland exception delineated therein. The State is therefore entitled to judgment as a matter of law with regard to this issue.

Finally, we note that "if the circumstances do not give rise to a Cronic exception, the defendant must fulfill the individualized requirements of Strickland." Minnick, 698 N.E.2d at 751 (citing Cronic, 466 U.S. at 659 n.26, 104 S. Ct. at 2047 n.26). Morgan has not identified any way in which his attorney's perceived errors prejudiced him or how, absent those errors, the outcome of the proceedings would have been different. Morgan's ineffective assistance of counsel claim fails.

Conclusion

The trial court properly granted summary judgment in favor of the State because the State was entitled to judgment as a matter of law with regard to Morgan's Brady and Cronic claims. We affirm.

Affirmed.

FRIEDLANDER, J., and MATHIAS, J., concur.